# Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-99 OF 1998
FAIZA TAMBY CHIK J
26 AUGUST 1999

***Labour Law*** *— Employment — Probationer — Dismissal — Poor performance — No performance appraisal or complaints by employer — No immediate protest over dismissal by probationer — Whether solely within employer's prerogative to discontinue with employement — Whether probationer acquiesced his dismissal — Whether employer need expressly to warn probationer prior to dismissal*

***Labour Law*** *— Employment — Dismissal — Probationer Poor performance — No performance appraisal or complaints by employer — No immediate protest over dismissal by probationer — Whether solely within employer's prerogative to discontinue with employement — Whether probationer acquiesced his dismissal — Whether employer need expressly to warn probationer prior to dismissal*

The applicant was appointed as a senior manager by the second respondent with effect from 30 January 1997. The appointment was subject to a probationary period of six months. On 2 September 1997, the second respondent informed the applicant that based on their overall assessment of the applicant's job performance, they were unable to confirm his appointment upon the expiration of the six months probationary period. His appointment was therefore terminated with effect from 3 September 1997. The applicant did not at the time dispute the second respondent's reasons for terminating his appointment. This was clearly seen in his letters dated 2 September 1997, 3 September 1997 and 6 September 1997. However, some 19 days after the termination, the applicant made allegations against the second respondent and challenged the basis for his dismissal on the grounds of poor performance by complaining that there was no performance appraisal and/or complaints about his performance by the second respondent. The applicant made a representation to the first respondent under s 20(1) of the Industrial Relations Act 1967 ('the Act'). The first respondent, exercising his discretion under s 20(3) of the Act decided not to refer the applicant's representation to the Industrial Court. The applicant made an application for an order of certiorari and an order of mandamus of the decision of the first respondent.

**Held,** dismissing the application:

(1) There was no evidence to show that the first respondent had considered irrelevant facts in arriving at his decision. Therefore, there was no ground to quash his decision. The first respondent had acted correctly and not exceeded his jurisdiction. Only documents tendered by both parties were studied by him and after

a thorough study of those documents, he was satisfied that the representation was unfit for reference to the Industrial Court (see p 115E–F). A

(2) At the end of the applicant's probationary period, it was open to the second respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the second respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily. The first respondent correctly recognized that it was the second respondent's prerogative as an employer to assess and determine the standard of performance of the applicant vis-a-vis the expected level of performance by the second respondent. Further, it was also clear that the applicant did not immediately protest when he was terminated for his poor performance and his later allegations were afterthoughts. Thus, the first respondent could not be faulted for exercising his discretion against the applicant and he did not exercise his discretion unlawfully (see pp 122F, 117C–D). B C D

(3) A perusal of the grounds put forward by the applicant revealed that the merits of the first respondent's decision was being challenged as if this was an appeal. This was obviously not permissible as it crossed the boundaries of the crucial jurisdiction of the High Court (see p 117B–C). E

(4) The exercise of the discretion by the first respondent not to refer the applicant's representation was not a usurpation of powers of the Industrial Court. It was a bona fide exercise of the discretion under s 20(3) of the Act. There was sufficient material before the first respondent for him to decide in the way he did. The facts placed before him impelled him to take the view that the applicant had been dismissed for poor performance and that the applicant acquiesced to his dismissal on that ground. Thus, the issue of whether or not the applicant was a poor performer was no longer of any relevant. Further, the first respondent also correctly considered and discarded the belated allegations hurled by the applicant against the second respondent (see p 118C–F). F G

(5) The first respondent was not legally obliged to consider whether or not there was a performance appraisal of the applicant by the second respondent or even if the second respondent had made any prior complaints about his performance. Suffice that the first respondent was aware that the applicant was a senior management employee and in law, the first respondent was entitled to conclude that the second respondent did not need expressly warn him or complain about his poor performance prior to dismissing him (see p 121E–F). H I

A **[Bahasa Malaysia summary**

Pemohon telah dilantik sebagai pengurus kanan oleh responden kedua yang mula berkuatkuasa dari 30 Januari 1997. Pelantikan itu tertakluk kepada tempoh percubaan selama enam bulan. Pada 2 September 1997, responden kedua telah memaklumkan pemohon
B bahawa berdasarkan kepada penilaian keseluruhan mereka terhadap prestasi kerja pemohon, mereka tidak dapat mengesahkan pelantikan beliau setelah tamat tempoh percubaan enam bulan itu. Pelantikan beliau, oleh demikian, telah ditamatkan dari 3 September 1997. Pemohon tidak pada masa itu mempertikaikan sebab-sebab responden kedua menamatkan pelantikan beliau. Ini dengan jelas
C dapat dilihat di dalam surat-surat beliau yang bertarikh 2 September 1997, 3 September 1997 dan 6 September 1997. Bagaimanapun, lebih kurang 19 hari selepas penamatan itu, pemohon telah membuat dakwaan terhadap responden kedua dan mencabar dasar pemecatan beliau atas alasan prestasi lemah dengan membuat aduan bahawa tiada penilaian prestasi dan/atau aduan-aduan
D mengenai prestasi beliau oleh responden kedua itu. Pemohon telah membuat satu representasi kepada responden kedua di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Responden pertama, dalam melaksanakan budi bicara beliau di bawah s 20(3) Akta tersebut memutuskan untuk tidak merujukkan representasi
E pemohon kepada Mahkamah Perusahaan. Pemohon telah membuat satu permohonan untuk satu perintah certiorari dan satu perintah mandamus terhadap keputusan responden pertama.

**Diputuskan**, menolak permohonan tersebut:

F (1) Tiada keterangan yang menunjukkan bahawa responden pertama telah mempertimbangkan fakta-fakta yang tidak berkaitan di dalam mencapai keputusan beliau. Oleh yang demikian, tiada alasan untuk membatalkan keputusan beliau. Responden pertama telah bertindak dengan betul dan tidak melebihi bidang kuasa beliau. Hanya dokumen-dokumen yang ditenderkan oleh kedua-
G dua pihak itu telah dikaji oleh beliau dan setelah satu kajian teliti ke atas dokumen-dokumen itu, beliau berpuas hati bahawa representasi itu adalah tidak sesuai untuk dirujuk kepada Mahkamah Perusahaan (lihat ms 115E–F).

(2) Di akhir tempoh percubaan pemohon itu, adalah terbuka kepada
H responden kedua untuk sama ada meneruskan atau menamatkan perkhidmatan pemohon. Pemohon, memandangkan adalah seorang pegawai dalam percubaan, tidak mempunyai pendapat di dalam perkara ini dan responden kedua, sebagai majikan, mempunyai hak penuh untuk menamatkan perkhidmatan beliau berdasarkan penilaian mereka bahawa beliau tidak melaksanakan
I fungsi-fungsi tugas beliau dengan memuaskan. Responden pertama telah dengan betul mengakui bahawa adalah prerogatif responden kedua sebagai seorang majikan untuk menilai dan

menentukan piawai prestasi pemohon itu iaitu tahap prestasi yang dijangkakan oleh responden kedua itu. Tambahan pula, adalah jelas bahawa pemohon tidak dengan serta merta membantah apabila beliau dipecat oleh sebab prestasi lemah beliau dan dakwaan yang sudah agak lambat tersebut merupakan sesuatu yang difikirkan kemudian. Oleh itu, responden pertama tidak boleh dipersalahkan kerana menggunakan budi bicara beliau terhadap pemohon dan beliau tidak menggunakan budi bicara beliau secara menyalahi undang-undang (lihat ms 122F, 117C–D).

(3) Penelitian alasan-alasan yang dikemukakan oleh pemohon itu telah mendedahkan bahawa merit-merit keputusan responden pertama itu telah dicabar seolah-olah ini merupakan satu rayuan. Ini dengan jelas tidak dibenarkan kerana ia melebihi bidang kuasa penting Mahkamah Tinggi (lihat ms 117B–C).

(4) Pelaksanaan budi bicara responden pertama untuk tidak merujuk representasi pemohon bukan merupakan satu rampasan kuasa Mahkamah Perusahaan. Ia merupakan pelaksanaan bona fide budi bicara di bawah s 20(3) Akta tersebut. Wujud bahan yang mencukupi di hadapan responden pertama untuk beliau mencapai keputusan yang dibuat beliau. Fakta-fakta yang dihadapkan kepada beliau mendorong beliau mengambil pandangan bahawa pemohon telah dipecat oleh sebab prestasi yang lemah dan bahawa pemohon telah akur kepada pemecatan beliau atas alasan itu. Oleh itu, persoalan sama ada atau tidak pemohon merupakan seorang pelaku yang lemah tidak berkaitan lagi. Tambahan pula, responden pertama juga telah dengan betul mempertimbangkan dan mengetepikan dakwaan-dakwaan yang agak terlewat itu yang telah dilemparkan oleh pemohon terhadap responden kedua tersebut (lihat ms 118C–F).

(5) Responden pertama tidak diwajibkan dari segi undang-undang untuk mempertimbangkan sama ada atau tidak wujud satu penilaian prestasi pemohon oleh responden kedua atau jikapun responden kedua telah membuat apa-apa aduan sebelumnya mengenai prestasi beliau. Adalah memadai bahawa responden pertama telah menyedari bahawa pemohon merupakan seorang pekerja kanan pengurusan dan di sisi undang-undang, responden pertama berhak untuk membuat kesimpulan bahawa responden kedua tidak perlu dengan nyata memberi amaran atau mengadu tentang prestasi lemah beliau sebelum beliau dipecat (lihat ms 121E–F).]

[*Editorial note*: The applicant has appealed to the Court of Appeal vide Appeal No W–01–101–99.]

## Notes

For cases on probationer, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 818–821.

A For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 723–730.

**Cases referred to**

B *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (refd)

*Express Newspapers Ltd v Labour Court & Anor* AIR 1964 SC 806 (refd)

*Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 (refd)

C *James v Waltham Holy Cross UDC* [1973] ICR 398 (refd)

*KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 (refd)

*Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 (refd)

*Littlewoods Organization Ltd v Egenti* [1976] ICR 516 (refd)

D *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 (refd)

*Minister of Labour, Malaysia v Chan Meng Yuan and another appeal* [1992] 2 MLJ 337 (refd)

*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (refd)

E *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour & Manpower* [1980] 2 MLJ 189 (refd)

*R v Independent Television Commission; ex p TSW Broadcasting Ltd* [1996] JR 185 (refd)

*Regina v Boundary Commission for England; ex p Foot & Ors* [1983] 1 QB 600 (refd)

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**Legislation referred to**

Industrial Relations Act 1967 s 20(1), (3)

*P Kuppusamy* (*KC Wong* with him) (*P Kuppusamy & Co*) for the G applicant.

*Mahamad Naser bin Disa* (Senior Federal Counsel) for the first respondent.

*Steven Thiru* (*Shook Lin & Bok*) for the second respondent.

**Faiza Thamby Chik J**:This is an application for, inter alia, an order of H certiorari and an order of mandamus of the decision of the Honourable Minister of Human Resources ('the first respondent') made on 30 July 1998 pursuant to s 20(3) of the Industrial Relations Act 1967 ('the Act'). The aforesaid decision of the first respondent was in respect of a representation of unfair dismissal made by the applicant under s 20(1) of the said Act. The I first respondent decided not to refer the applicant's representation to the Industrial Court for adjudication in accordance with the discretion vested in him under s 20(3) of the said Act. Sections 20(1) and 20(3) of the said Act read as follows:

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(3) Upon receiving the notification of the Director General under sub-s (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

Section 20(3) of the Act confers upon the Minister a discretionary power either to refer or not an applicant's representation to the Industrial Court. If the first respondent refuses to refer to the Industrial Court, it does not mean he has exceeded his jurisdiction or he has acted ultra vires the Act. The Supreme Court in the case *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 12 states:

> The Minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, so long as he exercises his discretion without improper motive, the exercise of discretion must not be interfered by the court unless he has misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militiates against the object of the statute. Otherwise, he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

I am of the view that the first respondent's decision not to refer the applicant's representation to the Industrial Court did not amount to an abuse of power. The Court of Appeal in the case of *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 at p 311 states:

> We hold that, the very fact that the Minister did not refer per se any particular trade dispute, does not necessarily mean that the Minister has abused his discretion. It is for him to be satisfied that it is a fit and proper case to refer to the Industrial Court. An exercise of a discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided the Minister had considered every aspect of the case. On the facts and circumstances of the present case, we are satisfied that the Minister had exercised his discretion in a manner which was in accord with the scheme and intention of the Act, and as such the court should not interfere.

Also, the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 513, also commented on the Minister's discretionary power:

> Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial

A Court. That this is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.

As always in every dispute between two parties especially between an employer and his employee there will be a dispute relating to question of B facts. The Act provides for a conciliatory proceeding which should be held by the Director General of Industrial Relation where dispute arises between the two parties. If the parties fail to settle, the Director General of Industrial Relation will notify the Minister of the said failure and then the Minister will decide as to whether the representation is fit to be referred to the Industrial Court.

C It is plain that even though there may be disputes of fact, the law gives the Minister the discretionary power to make a decision. There is no legal provision which states that where there is a dispute of facts, a representation must automatically be made to the Industrial Court. In the Supreme Court case of *Minister of Labour, Malaysia v Chan Meng Yuan and another appeal* D [1992] 2 MLJ 337 at p 342 the court stated that:

> On these facts, we are of the view that the Minister acted reasonably in exercising his discretion not to refer the respondent's representations to the Industrial Court. It certainly cannot be said that the facts point overwhelmingly in favour of a different decision.

E In the *Hong Leong Equipment* case, the Court of Appeal stated at p 519 that:

> It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s 20(1) of the Act, and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the facts F and material placed before him, the representations raise serious questions of fact or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive.

Henceforth from the above cases it is clear that the dispute of fact or of law per se is not sufficient ground for the court to quash the Minister's decision. G The facts must 'point overwhelmingly in favour of a different version' and where it 'raise serious question of facts or of law calling for adjudication'.

It is observed that in the instant case, the bank ('the second respondent') contended that the first respondent concluded that the applicant's complaint was not fit for referral to the Industrial Court. Accordingly, the second respondent supports the decision of the first H respondent.

It is common ground that the applicant was issued a letter of appointment on 30 January 1997 for the post of senior manager, Treasury, International Banking Group, by the second respondent (see p 66 encl 6 ('the motion papers')). The applicant's appointment was subject to a I probation clause with a probationary period. This clause reads as follows:

> The term of this contract commences on 3 March 1997 and unless otherwise terminated expires on 2 March 2000.

> Subject to the Bank being satisfied with your performance and subject further to the approval of Bank Negara Malaysia, the Immigration Department and/or the relevant authorities, at least 6 months prior to the expiry of the contract period, Southern Bank will initiate discussions with you on your future with the Bank with a view to reaching agreement on whether re-appointment is appropriate to this or another position and the terms and conditions thereof.

The applicant initially resisted the inclusion of the probation clause in his letter of appointment. However, he subsequently agreed to this clause in exchange for a much higher and more generous level of incentive bonus offered by the second respondent (see p 19, affidavit of Tan Ghee Kay affirmed on 13 April 1999 — encl 12). This incentive bonus is set out in cl 7 of the letter of appointment (see p 67 of the motion papers). It therefore cannot be disputed that the probation clause was at all material times binding on the applicant in respect of his appointment with the second respondent. The second respondent subsequently found the applicant's job performance to be unsatisfactory. It is noted herein that it was the second respondent's stand that given the applicant's seniority and qualification, he was expected to meet a certain level of competence and he was unable to do so. The second respondent informed the applicant on 2 September 1997 that based on their overall assessment of the applicant's job performance, they were unable to confirm his appointment upon the expiration of the six months probationary period. His appointment was therefore terminated with effect from 3 September 1997 (see p 107 of the motion papers).

It is noted that the applicant did not at the time dispute the second respondent's reasons for terminating his appointment. This is clearly seen in his letters dated 2 September 1997, 3 September 1997 and 6 September 1997 (see pp 38, 35 and 36, encl 12). These letters revealed the state of mind of the applicant at the material time when his appointment was terminated. It was clear that there was an acceptance by him that his services were duly terminated because he was unable to meet the standards of performance expected of him by the second respondent. He was only concerned at the time to secure some form of financial compensation for himself particularly on account of the expenses he has incurred in relocating himself from Australia. Thereafter, the applicant leveled various allegations on the second respondent (see pp 108–124 of the motion papers). The allegations made by the applicant against the second respondent were denied (see p 20, encl 12 at para 4). These allegations were obviously an afterthought. They were made some 19 days after the termination of his service and subsequent to the applicant's own letters (at pp 38, 35 and 36, encl 12) where he made no mention of these allegations but instead accepted the second respondent's reasons for the termination of his appointment. It is very pertinent to note that the applicant's only decision to make these allegations was very proximately connected to the time when he was queried by the second respondent on two exorbitant telephone bills (of RM1,621.61 and RM1,291.18) that he had incurred and which the second respondent had to pay on his behalf (see p 20 and pp 56 & 60, encl 12). The failure of the applicant to raise these purported allegations at the earliest opportunity (ie when he wrote the letters 2 September 1997,

A 3 September 1997 and 6 September 1997 to the second respondent) was most telling. And, the proximity of the allegations to the query on excessive telephone calls by the second respondent would suggest that the allegations were really a 'knee jerk' reaction from the applicant in response to the second respondent's query.

B It is also interesting to note that the applicant lodged his complaint under s 20(1) of the said Act on 19 September 1997 (see p 125 of the motion papers) which was before he made the aforementioned allegations against the second respondent (ie on 22 September 1997). This further buttressed the argument that the allegations were an after thought as rightly the allegations should have preceded the complaint. It is clear that the first C respondent had the benefit of considering all the material documents referred to above when he decided not to refer the applicant's complaint to the Industrial Court (see encl 10, para 5). The first respondent therefore duly came to the conclusion that the applicant's complaint ought not to be referred to the Industrial Court. The first respondent's reasons for his decisions are found at p 127 of the motion papers, and they read as follows:

D

(i) Perayu telah tidak disahkan dalam jawatannya dan ditamatkan perkhidmatannya pada akhir tempoh percubaan kerana prestasi kerja yang tidak memuaskan.

(ii) Tempoh percubaan enam bulan merupakan salah satu syarat dalam E perlantikan perayu oleh pihak majikan.

In the instant case there was no evidence to show that the first respondent had considered irrelevant facts in arriving at his decision. Therefore there was no ground to quash his decision. The first respondent's affidavit clearly shows that he had acted correctly and not exceeded his jurisdiction in considering the relevant facts in arriving at his decision. In para 5 of the F Minister's affidavit it was clearly stated that only documents tendered by both parties were studied by him and after a thorough study of these documents, the Minister was satisfied that the representation was unfit for reference to the Industrial Court. The Minister had given his reasons as stated in exh RJR-16:

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(i) Perayu telah tidak disahkan dalam jawatannya dan ditamatkan perkhidmatannya pada akhir tempoh percubaan kerana prestasi kerja yang tidak memuaskan;

(ii) Tempoh percubaan 6 bulan merupakan salah satu syarat dalam perlantikan perayu oleh pihak majikan.

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It must be noted that the reasons given by the Minister were not of his own conclusions but were facts elicited from documents forwarded by the parties to the Director General of Industrial Relation. The company had clearly stated in the termination letter:

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> After due consideration and based on our overall assessment of your performance, we regret to inform you that the Bank is not able to confirm your above appointment upon the expiration of your six (6) month probation period.

The termination was not done with any reference to the contract of service — exh LAL-1 which stated in cl 5: A

> Probation: six (6) months.
>
> Clause 18
>
> Termination of Employment: Either party may terminate this contract of service by giving three (3) months notice in writing or salary in lieu of notice. Provided always that during the period of probation, either party may terminate this contract of service by giving to the other party twenty four (24) hours notice in writing. B

The proviso to the clause clearly empowered both parties to terminate the contract of service by giving 24 hours notice. C

In the case of *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 at p 321, the Federal Court agreed to the statement of Das Gupta J in *Express Newspapers Ltd v Labour Court & Anor* AIR 1964 SC 806 where it was stated:

> This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the service of a permanent employee could be terminated. At the end of the six months period, the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer. D E F

It is clear from the above quotation that our Federal Court has accepted the principle applied in *Empress Newspaper Ltd*:

> At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory.

I am of the opinion that this principle is clearly applicable to the instant case and I hereby adopt it. There is no serious dispute of fact or of law which requires a reference to the Industrial Court. G

In an application for judicial review of the exercise of the ministerial discretion under s 20(3) of the said Act, the following salutary words of the Court of Appeal in the case of *Michael Lee Fook Wah v Minister of Human Resources and another appeal* [1998] 1 MLJ 305 at pp 305 to 306 must be borne in mind: H

> In an application for an order of certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. Furthermore, the law does not require the first respondent to refer every matter to the Industrial Court. I

A Section 20(3) of the Act confers a discretion on the first respondent whether to refer a complaint to the Industrial Court or not, which will depend on the facts and circumstances of each case. The court will only interfere when it can be shown that the discretion was exercised unlawfully. A negative act, such as not referring the complaint to the Industrial Court, is equally an exercise of discretion.

B It is important therefore that this application is not converted into an appeal on the merits of the first respondent's decision not to refer the applicant's representation to the Industrial Court. A perusal of the grounds put forward by the applicant (see pp 44–47 of the motion papers) immediately reveals that the merits of the first respondent's decision was being challenged as if this was an appeal. This is obviously not permissible as it crosses the C boundaries of the crucial jurisdiction of the High Court. I come to the conclusion that the first respondent correctly recognised that it was the second respondent's prerogative, as an employer, to assess and determine the standard of performance of the applicant vis-a-vis the expected level of performance by the second respondent. Further, it was also clear that the D applicant did not immediately protest when he was terminated for his poor performance and his later allegations were afterthoughts. Thus, the first respondent cannot be faulted for exercising his discretion against the applicant and he certainly did not exercise his discretion unlawfully. The nature of the discretion vested in the first respondent under s 20(3) of the said Act may be culled from the following words in the provision, '... the E Minister may, if he thinks fit, refer the representation to the court ...'. It is a very subjective discretion which should not be easily impugned or questioned by the Court. Authority for this proposition is found in the Federal Court case of *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour & Manpower* [1980] 2 MLJ 189 at p 190 where Raja Azlan Shah CJ (Malaya) said:

F

> This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular cause of action within the scope of the discretionary power. It is the exercise by him of the discretion vested in him, not in the courts, that we are here required to review, and when his action is challenged in the courts for G alleged abuse of discretion, we are obliged to resist any temptation to convert our jurisdiction to review into a reconsideration of the merits as if on appeal.

And at p 191 Raja Azlan Shah CJ (Malaya) said:

> In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient. The very concept of H administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. These words taken from the speech of Lord Diplock in the *Tameside* case (at p 695) reflect the truism that those in whom discretionary power is vested have, to a greater or lesser extent, a range of options at their disposal. As we have said earlier in this I judgment, we must guard against any tendency to equate the distinct process of mere review with an unarticulated opinion that having investigated the facts we are in a better position to adjudicate upon the merits. That is not our function.

> It is not for us to say what shall or shall not be done in this special area of delegated jurisdiction. Our duty is only to see that the matter in hand has been determined by the Minister in accordance with the policy and object of the Act.

In *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 10, the Supreme Court alluded to the ministerial discretion under s 20(3) of the said Act and posited the following principles of law:

> There is no question that the power of the minister under s 20(3) of the Act is wide and the language used by the legislature would seem to confer on the minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted bona fide, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. He had an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.

The exercise of the discretion by the first respondent not to refer the applicant 's representation was not a usurpation of powers of the Industrial Court. The first respondent rightly deferred to the second respondent's evaluation of the job performance of the applicant and noted that the applicant had accepted a six months probationary period for the purposes of the evaluation. In addition to that, the first respondent also had the benefit of the applicant's letters to the second respondent post his termination, which clearly showed that the applicant at the material time accepted that his termination was on the grounds of his poor performance. This was therefore a bona fide exercise of the discretion under s 20(3) of the Act by the first respondent. It is therefore obvious that there was sufficient material before the first respondent for him to decide in the way he did. The facts placed before him, both by the applicant and the second respondent, impelled him to take the view that the applicant had been dismissed for his poor performance and that the applicant acquiesced to his dismissal on that ground. Thus, the issue of whether or not the applicant was a poor performer was no longer of any relevance. Further, the first respondent also correctly considered and discarded the belated allegations hurled by the applicant against the second respondent. These afterthoughts were also placed before the first respondent when he made his decision against referral. There are three basic principles of administrative law that apply here to support the exercise of the ministerial discretion in the instant case, which was clearly founded on all the relevant facts of the case.

(a) First, the decision of the first respondent based on the exercise of the discretion under s 20(3) of the said Act is to be upheld if all the relevant facts do not point overwhelmingly in favour of a different decision (ie in this case, to refer the complaint to the Industrial Court). This principle of law was laid down by the Supreme Court in *Minister of Labour Malaysia v Chan Meng Yuen & Anor and another appeal*[1992] 2 MLJ 337 at p 342 where Harun Hashim SCJ said:

> On these facts, we are of the view that the Minister acted reasonably in exercising his discretion not to refer the respondent's representations to

A the Industrial Court. It certainly cannot be said that the facts point overwhelmingly in favour of a different decision.

(b) Secondly, given that the first respondent had the benefit of all the relevant facts in this case, he had a range of options at his disposal in coming to his decision. He considered the second respondent's stand B in the matter as well as the allegations made by the applicant and made the decision that this was not a fit and proper case for referral. He was therefore acting within the parameters of his discretion. It therefore cannot be said that he would have come to a different decision on the material available to him. The court should therefore not impugn his decision just because he did not decide to refer the matter to the C Industrial Court. In this regard, the English Appeal Court case of *Regina v Boundary Commission for England; ex p Foot & Ors* [1983] 1 QB 600 at pp 626–627 is relevant and the following statement by Sir John Donaldson MR may be noted:

> In the present case, it has not been submitted that the commission have D exceeded or are about to exceed the letter of their statutory powers. The complaint is more that they have unreasonably exercised or failed to exercise the various discretions conferred on them by statute. This submission necessitates a brief consideration of the meaning of 'reasonableness' in this context.

E As Professor HWR Wade says in *Wade, Administrative Law* (5th Ed, 1982) at p 362:

> The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area F in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

G What then is this objective standard? The locus classicus on the subject is a passage from the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at p 230, in which he stated what has become known as 'the *Wednesbury* principle.' Mr Williams expressly accepted that his H principle applies so as to govern and limit the powers of the court to intervene in regard to the activities of the commission. We need not cite the passage from Lord Greene's judgment verbatim. For present purposes it will suffice to say that the *Wednesbury* principle would or might in our opinion entitle the court to intervene if it was satisfied that the commission had misdirected themselves in law, or had failed I to consider matters which they were bound to consider or had taken into consideration matters which they should not have considered. It would not, however, entitle it to intervene merely because it

considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on the ground of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations in the courts must thus be a heavy one, which by its very nature may be difficult to discharge.

(c) Thirdly, even assuming, without concluding that the first respondent made a mistake, then with the benefit of all the relevant facts of the case, the decision of the first respondent cannot be challenged merely because he made a mistake. Although the first respondent here cannot be said to have made a mistake, nevertheless even if he did, that alone is not sufficient for judicial review purposes. This position was made abundantly clear in the House of Lords case of *R v Independent Television Commission; ex p TSW Broadcasting Ltd* [1996] JR 185 at p 192 by Lord Templeman who said:

> Judicial review does not issue merely because a decision maker has made a mistake and it is not permissible to probe the advice received by the decision maker or to require particulars or administer interrogatories or, as Mr Pollock on behalf of TSW suggested to cross-examine, in order to discover the existence of a mistake by the decision maker or the advisers of the decision makers. An applicant for judicial review must show more than a mistake on the part of the decision maker or his advisers. Where a decision is made in good faith following a proper procedure and as a result of conscientious consideration, an applicant for judicial review is not entitled to relief save on the grounds established by Lord Greene MR in *Associated Provincial Picturehouses Ltd v Wednesbury Corp* [1948] 1 KB 223 at p 229:
>
> > 'It is true the discretion must be exercised reasonably. Now, what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority ... that is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all these things run into one another.'

It is observed that the applicant now challenged the basis for his dismissal on the grounds of poor performance by complaining that there was no performance appraisal and/or complaints about his performance by the

second respondent. It cannot be disputed that the applicant was holding a senior management position and he was expected to know the standard of job performance required of him. He therefore cannot plead or seek refuge in his purported ignorance of what was expected from him by the second respondent. This is a trite principle of employment law in cases concerning poor performance of senior employees. The principle was put as follows by Sir John Donaldson who in *James v Waltham Holy Cross UDC* [1973] ICR 398 said:

> In the field of capability similar problems frequently arise. If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business.

The first respondent was not legally obliged to consider whether or not there was a performance appraisal of the applicant by the second respondent or even if the second respondent had made any prior complaints about his performance. Suffice it that the first respondent was aware that the applicant was a senior management employee and, in law, the first respondent was entitled to conclude that the second respondent did not need expressly warn him or complain about his poor performance prior to dismissing him. In *Littlewoods Organization Ltd v Egenti* [1976] ICR 516 at p 517, the Employment Appeal Tribunal held:

> On the employers' appeal:
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> Held, allowing the appeal, that the strict requirements for procedures to be taken by employers before dismissing an employee for misconduct as a disciplinary measure did not necessarily apply to dismissal for incompetence; that where an employee was so incompetent that a warning was unlikely to result in an improvement in his work no warning was necessary and the correct test was whether the overall result was a fair one; that accordingly the industrial tribunal had erred in holding that because there was no specific warning of dismissal the dismissal was necessarily unfair and the case would be remitted to the industrial tribunal for further consideration.

On the point that the applicant had sought to challenge the first respondent's decision on the ground that he failed to appreciate that the applicant as a probationer had security of tenure in his appointment and that he could not be dismissed without due cause, it would appear that the

applicant was here relying on the Court of Appeal case of *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 where it was held: A

> Held, allowing the appeal:
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> Although the word 'probation' or 'probationary' was not found in the definition of workman in s 2 of the Act, the word 'apprentice' was mentioned in the section and an apprentice would normally be a probationer. Therefore, B employees on probation would come within the purview of s 20(1) of the Act and the Industrial Court would have jurisdiction to hear and determine whether the dismissal of the appellant was with just cause or excuse.

It must be noted that the applicant 's reliance on *Khaliah bte Abbas*'s case is misplaced. The Court of Appeal in that case did not consider the earlier C Federal Court decision of *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 at p 321 which confirmed the position of probationers, as set out in the Indian Supreme Court case of *Express Newspapers Ltd v Labour Court & Anor* AIR 1964 SC 806, where Das Gupta J held:

> This contention is, in our opinion, wholly unsound. There can, in our D opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired - except E on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

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Therefore in the instant case at the end of the applicant's probationary period, it was open to the second respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the second respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily. If it were otherwise, G there would be no distinction between probationary employment and permanent employment. The decision of the Court of Appeal in *Khaliah bte Abbas*'s case was given per in curiam. In *Khaliah bte Abbas*'s case the Court of Appeal considered the question of whether a probationer falls under the purview of s 20 of the Act.

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In the instant case, the first respondent's decision not to refer the complaint was a proper exercise of his discretion under s 20(3) of the said Act. He had acted reasonably in exercising his discretion. *Wade and Fosythe, Administrative Law* (7th Ed) at p 399 said:

> The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the I discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the

A deciding authority has a genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion.

For these reasons, I dismissed the application in encl 6 with costs.

*Application dismissed.*

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Reported by Jafisah Jaafar

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